U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: NOV 2 6 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn in part and affirmed in part. The petition will remain denied.

The petitioner describes itself as a retail business. It seeks to employ the beneficiary permanently in the United States as a "Business Development Specialist" pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).[1] The director determined that the petitioner had not established that the beneficiary met the minimum requirements for the position offered as listed on the labor certification. The director denied the petition accordingly, citing discrepancies in the record, and making a finding a fraud.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 5, 2012 denial, the issues in this case are: (1) whether the beneficiary meets the experience requirements of the labor certification; and (2) whether the discrepancies in the record are sufficient to support a finding of fraud.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.[2]

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[1] The ETA Form 9089 states the job title as "Computer Systems Analyst."

[2] On May 29, 2013, the AAO issued the petitioner a Notice of Intent to Dismiss (NOID) and Request for Evidence (RFE), requesting that the petitioner submit evidence that the institution which awarded the beneficiary's master's degree, Florida, is an accredited university. Counsel for the petitioner submitted sufficient evidence in response to the AAO's RFE to establish that has been accredited by the Accrediting Council for Independent colleges and Schools, which is recognized by the Council for Higher Education Accreditation (CHEA). The AAO also requested the petitioner's 2011 and 2012 tax returns and Forms W-2 or 1099s. Counsel submitted the petitioner's 2011 tax return transcripts, which state sufficient net income to pay the beneficiary's proffered wage for 2011, as well as the petitioner's request for an extension to file its 2012 tax return with the IRS.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal.

Beneficiary's qualifications

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position, "Business Development Specialist," has the following minimum requirements:

H.4. Education: Master's degree in Business Administration.
H.5. Training: None required.
H.6. Experience in the job offered: 12 months of experience.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

The position offered, "Business Development Specialist," includes the following job duties:

> To develop, implement and maintain business development/IT activities to provide more efficient and cost productive functioning. Fabricate software and networking

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See Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

> systems to meet company needs regarding sales; revenues; electronic transfers; POS systems; gas revenues, inventory and commissions; auditing and tracking of credit card transactions; store data accounting and connectivity to parent company. Prepare gas inventory reconciliation reports. Review and advise on EPA requirements subject to audit (underground leakage). Develop secure portals to manage stores' day to day operations, supply chain management and inventory control. Prepare business, financial and feasibility reports on expansion and acquisition projects. Conduct financial analysis and structuring of business projects and site review.

The labor certification states that the beneficiary qualifies for the offered position based on the following experience:

- As a "System Network Engineer" with [redacted] a "retail stores/repair facility," in [redacted] Florida, from January 2, 2007 to June 9, 2011.
- As a "System Network Engineer" with [redacted] a "gas station/convenience store," in [redacted] Florida, from August 19, 2004 until November 1, 2006.
- As a "Managing Partner/IT Specialist" for [redacted] an "import/sale-Computer Systems Parts" business, in [redacted] Pakistan, from May 1, 2000 to June 1, 2002.
- As a "Desktop Support Manager" for [redacted] a "computer sales/service" business, in [redacted] Pakistan, from March 1, 1998 to April 1, 2000.

The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(g)(1) states:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainers(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The record contains an experience letter, dated October 8, 2011, from the Vice President of [redacted] which states that the beneficiary had been employed there as a "System Network Engineer" since January 2007. The instant labor certification is certified for the beneficiary to be employed as a Business Development Specialist. While the Vice President states that the beneficiary "assists" with site reviews, financial and systems analysis, and project structuring, the Vice President does not indicate that these duties are performed independently by the beneficiary; rather the letter indicates that the beneficiary only assists others who are responsible for these duties. The labor certification indicates that the beneficiary is responsible for the "monitoring, development, troubleshooting, improvement' of computer systems, databases, and software." These duties appear

to be those of a computer systems engineer, but not those of a "business development specialist," as described above, which focuses on developing, implementing, and maintaining business development/IT activities, and preparing business and financial analyses. Therefore, the job described by the Vice President does not appear to be the same as the position offered. Further, the letter from the petitioner's president, dated June 13, 2012, states that the beneficiary's position with the petitioner "is a completely different position than the one he holds with as a Systems Network Engineer." This demonstrates that the petitioner considers the beneficiary's experience with to be in a different position than the position offered. Therefore the beneficiary's experience with does not qualify the beneficiary for the instant position. Therefore, the petitioner has not demonstrated that the beneficiary meets the experience requirements of the labor certification.

The record also contains an experience letter from Pakistan, which states that the beneficiary worked there as a Computer Hardware Engineer from December 1997 to May 2001. This experience predates the beneficiary's degree from This experience conflicts with the experience claimed on the beneficiary's resume and the two labor certifications in the record, one filed by and the other by the instant petitioner, all of which state that the beneficiary worked at as a Desktop Support Manager from March 1998 to April 2000. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). As stated in the director's Notice of Intent to Deny (NOID), the petitioner must resolve this discrepancy with independent objective evidence. *Id.* The petitioner did not provide any evidence to resolve this on appeal. Due to this unresolved discrepancy, the petitioner may not utilize the beneficiary's employment with to meet the experience requirements of the labor certification. Therefore, the petitioner has not established that the beneficiary has the required 12 months of experience in the position offered.

Discrepancies in the record

The director also held that the labor certification was certified for the position of "Computer Systems Analyst," not as a "Business Development Specialist" as stated on the Form I-140, which does not match the SOC code on the labor certification. On appeal, the petitioner asserts that there is a correlation between the job title of "Computer Systems Analyst" and that of "Business Development Specialist." The occupation of the offered position is determined by the DOL and its classification code is notated on the labor certification. The DOL previously used the Dictionary of Occupational Titles (DOT) to classify occupations. O*NET is the current occupational classification system in use by the DOL.[4] O*NET incorporates the Standard Occupational Classification (SOC) system,[5]

[4] O*NET, located at http://online.onetcenter.org, is described as "the nation's primary source of occupational information… containing information on hundreds of standardized and occupation-specific descriptors." http://www.onetcenter.org/overview.html (accessed November 14, 2013).

[5] http://www.onetcenter.org/taxonomy.html (accessed November 14, 2013).

which is designed to cover all occupations in the United States.[6] The instant labor certification states that the position offered is for a "Computer Systems Analyst," occupational code 15-1051.00. A search of O*Net Online demonstrates that occupational code 15-1051.00 is no longer in use and that the code 15-1121.00 should now be used. On appeal, counsel submits a printed copy of search results from O*Net Online for "Business Development Specialist," which includes a "Computer Systems Analyst" position, code 15-1121.00, as a result for the search terms "Business Development Specialist." The AAO notes, however, that while the SOC code utilized by DOL is important to the prevailing wage it issued, and may impact other aspects of the immigrant petitioner, the SOC Code does not define the job opportunity. Rather, the requirements for the position offered, including education, training, experience, and the job duties provided by the petitioner on the labor certification are controlling. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). As discussed above, because the beneficiary's experience, based on the job duties provided on the labor certification and the experience letter, was as a System Network Engineer, and not as a Business Development Specialist, the petitioner has not demonstrated the beneficiary possessed the experience required for the position offered.

The director also found that fraud existed based on discrepancies in the record regarding the beneficiary's experience. The director noted that a previous immigrant petition filed by [redacted] was denied based on a finding of fraud. In that case, the director found the beneficiary's experience was misrepresented on a labor certification that was subsequently invalidated. However, in the instant matter, the director found fraud because the same experience, previously found to be fraudulent, was not listed on the instant labor certification. The petitioner's omission of experience previously found to be fraudulent cannot be the basis of a second finding of fraud or misrepresentation under these circumstances; it is unclear how such an omission would shut off a line of inquiry in the instant matter. *See Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961); *Matter of Kungys v. U.S.*, 485 U.S. 759 (1988). The petitioner did not list experience previously found to be fraudulent, which is a circumstance different from an affirmative misrepresentation of experience or concealment predictably capable of affecting an official decision. *See Kungys v. U.S.*, 485 U.S. 759.

The record contains a letter from the beneficiary, dated July 26, 2012, in which he told the officer at the [redacted] registration in early 2003 that he was "sponsored by [redacted] and was "awaiting an assignment." The beneficiary also states in this letter that he was a victim of immigration fraud by [redacted] and that he was not yet aware of the "scam being perpetrated by [redacted] or [redacted]" The record contains a Form I-140 filed by [redacted] on March 22, 2007, the beneficiary's resume, and a Form G-325A, accompanying the beneficiary's Form I-485, which each state that the beneficiary was employed by [redacted] The beneficiary

[6] http://www.bls.gov/soc/socguide.htm (accessed November 14, 2013) (relating to the 2000 SOC); http://www.bls.gov/soc/home.htm (accessed November 14, 2013) (relating to the 2010 SOC).

stated in his July 26, 2012 letter that he did not prepare, submit or sign the I-140 filed by but the record reflects that he did sign the Form G-325A, which states that he worked for Hensernet from June 2002 to August 2004. The beneficiary states in his July 26, 2012 letter that counsel advising him with the filing of the Form I-140 by told him that he needed to state that he was employed by Hensernet because it had sponsored him.[7] The issue as to whether the beneficiary worked at is not material to the instant petition because he is not relying upon this experience to qualify for the position offered.

The director also cited evidence that Syed Shah, the petitioner's president, was contacted by USCIS and asked whether he had any business affiliations with the President of Mr. stated that he did not have any business affiliations with Mr. but subsequently acknowledged that Mr. had invested in some of his ventures. The director cited evidence from the Florida Department of State Division of Corporations which shows that Mr. had been an officer of owned by Mr. The director stated that Mr. statements regarding his relationship with Mr. have not been shown to have been truthful initially. The AAO finds that the statements by Mr. are not material to the instant petition.

The director also notes that the subsequent Form G-325A, signed by the beneficiary on September 29, 2011, states different dates of employment with from the previous Form G-325A. However, counsel for the petitioner correctly states that the second Form G-325A is not inaccurate because it is listing only the dates of employment covering the past five years as requested on the Form G-325A. Therefore, the director's conclusion regarding this discrepancy is withdrawn.

The previous finding, that the beneficiary misrepresented experience on the invalidated labor certification, does cast doubt on the beneficiary's claimed experience. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-592. However, a prior misrepresentation is insufficient to support a separate finding of fraud or misrepresentation in the instant matter. Therefore, the director's finding of fraud in this matter is withdrawn.

Therefore, while acknowledging that these discrepancies tend to cast doubt on the evidence in the record, the AAO finds that because these discrepancies are not material toward establishing approval of the instant petition, the director's finding of fraud in the instant matter is withdrawn.

The AAO affirms the director's decision in part, concluding that the beneficiary has not

[7] A Form 9089 prepared by and filed with the DOL on May 28, 2008 also states that the beneficiary worked for from June 1, 2002 to August 1, 2004. The beneficiary signed this Form 9089 but did not state a date of signature.

demonstrated that the beneficiary meets the experience requirements of the labor certification to qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The AAO withdraws the director's finding of fraud in the instant petition.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.